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No. 88-64

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,

Petitioners,

vs.

KALIMA JENKINS, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS KALIMA JENKINS, *et al.* IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Does the Eleventh Amendment bar the adjustment of an award of attorneys' fees against a state under 42 U.S.C. § 1988 to compensate for delay in payment, when it is reversible error under state law for a trial court not to include an award of prejudgment interest against state agencies when fees are awarded?

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and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS KALIMA JENKINS, ET AL. IN OPPOSITION TO THE PETITION

Respondents Kalima Jenkins, et al., urge that the petition for a writ of certiorari be denied on a number of grounds: (1) the issue of whether the Eleventh Amendment bars compensation for

delay in payment in calculating an attorneys' fee against a state is not raised by the present case since Missouri, by statute, mandates the award of prejudgment interest on attorneys' fees awards against state governmental agencies; (2) the issue is not an important one, since it is clear that there is no bar under the Eleventh Amendment to the award of fully compensatory attorneys' fees by a federal court against a state agency; (3) the other issues relating to the amount of fees awarded by the district court and upheld by the court of appeals are not of importance, involve findings of fact that are not clearly erroneous but are fully supported by the record, and involve the application of established law to matters within the sound discretion of the district court.

STATEMENT OF THE CASE

The statement of the case in the petition does not adequately describe the outcome of the litigation on the merits nor the lengthy and thorough litigation of the fees application in the district court.

1. The Litigation on the Merits.

This case began as a challenge by the Kansas City, Missouri School District (KCMSD) against the State of Missouri for the defendant's failure to correct the severe problems of segregation and racial discrimination that had their origins in the statewide de jure school segregation that existed prior to this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). Through a succession of orders of the district court, plaintiffs representing black school

children in the KCMSD were intervened, the KCMSD was realigned as a party defendant, and a series of suburban school districts were joined as parties defendant since the relief sought included, inter alia, interdistrict integration of school facilities.

Throughout the course of the litigation, the KCMSD admitted its historic responsibility for some of the remaining segregation in the system and, while nominally a defendant, in fact supported the plaintiffs during the litigation. The state, on the other hand, battled to the bitter end against any finding of liability and responsibility for providing any relief. After a lengthy trial of plaintiffs' case, the district court first found in favor of the suburban school districts as to their responsibility for the segregation of

KCMSD and therefore dismissed them from the case. The state persisted in its defense necessitating further proceedings on the merits as well as on relief.

Subsequently, the district court issued its decision holding the state liable for creating and maintaining, through its failure to carry out its duty to disestablish, the segregation and racial isolation of the KCMSD. The court found that state policies with regard to segregated schools within districts, the exclusion of black schools from suburban districts and their isolation in Kansas City, underfunding of black schools, discrimination in housing, and other matters, all were directly responsible for the creation of KCMSD as a black school district. It ordered further proceedings to determine appropriate relief and subsequently entered a series of remedial

orders that require the state and the KCMSD to spend a total to date of more than $400,000,000 in capital improvements, remedial programs, magnet schools, etc.[1]

2. The Fee Applications.

Following the decision finding liability on the part of the state, plaintiffs filed lengthy fee applications on behalf of private local counsel, Arthur Benson, as well as counsel provided by the NAACP Legal Defense and Educational Fund, Inc. The applications meticulously detailed all of the time spent by attorneys, paralegals, and law clerks, as well as all expenditures. The applications then excluded time that was allocable to the claims relating to the

[1]The Eight Circuit has affirmed the district court's remedial orders in nearly all respects. Jenkins v. Missouri, ___ F.2d ____ (8th Cir. Nos. 86-1934; 86-2537; 87-1749; 87-2299; 87-2300; 87-2588, August 19, 1988).

issues and defendants concerning which plaintiffs had not prevailed, pursuant to this Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983).[2] All other time, it was urged, was either clearly allocable to claims upon which plaintiffs had prevailed or was spent on tasks regarding which prevailing and non-prevailing claims were interwoven and interrelated. The state filed lengthy objections and took the position that not only should clearly allocable time be excluded, but that then an arbitrary fifty percent of all remaining time be excluded on the assumption that that amount of time was probably spent on non-prevailing

[2]Benson cut 2017 attorney hours and 2521 paralegal hours from his claim. The total Benson reduction was approximately 21% of Benson's requested lodestar. The LDF attorneys eliminated 1611 attorney hours, 319 recent law graduate hours, 920 paralegal hours, and 3286 law clerk hours. The total LDF reduction was approximately 16% of LDF's lodestar request.

issues. Although the state made some generalized objections to specific entries and to the requested hourly rates, it conducted no discovery.

The district court held a one-day hearing on the fee applications. At the hearing, the plaintiffs put on two expert witnesses, William Taylor, Esq., an expert in the area of school desegregation litigation, and Mr. Robert Weil, an expert in the area of the economics of legal practice. Mr. Taylor testified concerning the interrelatedness of the issues litigated in the case and the excellent results obtained. Mr. Weil testified concerning appropriate hourly rates for the lawyers, paralegals, and law clerks, and concerning the absolute necessity for compensating for delay in payment in order to be able to attract attorneys to take on this type of case.

Further testimony was given by a prominent local Kansas City attorney concerning hourly rates and the undesirability of a civil rights case of the magnitude of the present one.

The state put on no testimony of its own, except to call Mr. Arthur Benson, plaintiffs' local counsel, to the stand to ask a few questions about his application.

3. The District Court's Decision.

Following the hearing, both sides submitted proposed findings of fact and were give an opportunity to supplement the record. The district court entered its order accompanied with detailed findings of fact regarding the reasonableness of the hours requested and the hourly rates. With regard to Hensley reductions, the court found that the specific allocations made by plaintiffs were accurate and the other work was so interrelated between

further reductions were not appropriate. The court made similar findings with regard to expenses as well as specific findings regarding hourly rates of attorneys, paralegals, and law clerks.

4. The Decision of the Court of Appeals.

On appeal, the state pursued its various arguments relating to proper Hensley reductions in view of the decisions of the district court and the court of appeals on the merits of the case. The court of appeals upheld the district court in all respects, holding that its findings were fully supported by the record. The full court declined to hear the case en banc, thereby implicitly rejecting the state's argument that the panel decision on attorneys' fees was in any way inconsistent with the en banc decision on the merits rendered just one year before. Jenkins v. Missouri, 807

year before. Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 484 U.S. _____, 98 L.Ed.2d 34 (1987), Appendix, p. A50. Judge John Gibson, the author of the en banc decision on the merits was also the author of the panel decision on attorneys' fees.

ARGUMENT

I.

NO ELEVENTH AMENDMENT ISSUE IS RAISED SINCE MISSOURI LAW MANDATES THE AWARD OF PREJUDGMENT INTEREST AGAINST A STATE AGENCY

As we demonstrate in Part II, infra, the Eleventh Amendment does not bar a federal court from including compensation for delay in payment when it awards attorneys' fees against a state. However, this issue would never be reached in this case because of the well established rule that even in circumstances where there is a general

prohibition against the award of interest against a state, that prohibition disappears if state law itself permits such an award. See United States v. North Carolina, 136 U.S. 211 (1890); Virginia v. West Virginia, 238 U.S. 202 (1915); Cranford Co. v. City of New York, 38 F.2d 52 (2d Cir. 1930). Since Missouri law not only allows but mandates awards of interest against state governmental agencies, including prejudgment interest on fees claims, the inclusion of interest in the fees awarded by the federal court was consistent with Missouri law; as a result, the Eleventh Amendment issue sought to be presented here simply does not arise.

Section 408.020 of the Missouri Statutes[3] has been construed by the

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[3]Section 408.020 provides:

Creditors shall be allowed to receive interest at the rate of nine

Missouri Supreme Court to require trial courts to award prejudgment interest whenever the amount due is liquidated, or, although not strictly liquidated, is readily ascertainable by reference to recognized standards. Denton Construction Co. v. Missouri State Highway Commission, 454 S.W.2d 44, 60 (Mo. 1970); St. Joseph Light & Power Co. v. Zurich Ins. Co., 698 F.2d 1351, 1355 (8th Cir. 1983); see also, Slay Warehouse Co., Inc. v. Reliance Insurance Co., 480 F.2d 214, 215 (8th Cir. 1974)("[T]he award of prejudgment interest in a case in which Section 408.020 is

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percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

applicable is not a matter of court discretion; it is compelled.") It is readily evident from a substantial body of Missouri case law that attorneys' fees awards pursuant to 42 U.S.C. § 1988, based as they are on the lodestar method of calculation, are readily ascertainable within the meaning of § 408.020 and therefore must include an award of prejudgment interest.

Prejudgment interest under § 408.020 has been awarded in quantum meruit actions on unliquidated claims for legal services that were measured and determined by the standard of reasonable value of services rendered. Laughlin v. Boatmen's National Bank of St. Louis, 189 S.W.2d 974 (Mo. 1945); Garrett v. Citizens Saving Ass'n, 636 S.W. 2d 104, 112 (Mo. App. 1982). See also, Whalen, Murphy, Reid v. Estate of Roberts, 711 S.W.2d 587, 590 (Mo. App.

1983), holding that the trial court erred in not awarding prejudgment interest on an attorney's fees claim and that plaintiff's failure to "receive an award for the full amount of the claim does not bar the right to receive pre-judgment interest on the amount the trial court actually awarded." Thus, the fact that the defendant denies liability or challenges the amount claimed will not relieve the defendant of his duty to pay the prejudgment interest of the award found to be due. Knight v. DeMarea, 670 S.W.2d 59 (Mo. App. 1984); St. Joseph Light & Power Co. v. Zurich Ins. Co., supra.

Finally, the Missouri courts have also made clear that § 408.020 is fully applicable in litigation involving the State of Missouri as a defendant. Denton Construction, supra, Bernard McMenamy Contractors, Inc., v. Missouri State

Highway Commission, 582 S.W.2d 305 (Mo. App. 1979). Indeed, the state defendants' argument that the prejudgment interest provision of § 408.020 did not authorize awards against the state was expressly rejected in Steppelman v. State Highway Comm'n of Missouri, 650 S.W.2d 343, 345 (Mo. App. 1983), citing Denton Construction and McMenamy Contractors.[4]

Since under Missouri law the award of prejudgment interest is permissible against the state or one of its agencies, and would be mandated by Missouri Statute § 408.020 with regard to plaintiffs' attorneys' fees claim in the instant case, there can be no bar under the Eleventh Amendment or otherwise to such an award by

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[4]Section 408.040 of the Missouri Statutes, which provides for interest on judgments or orders of any Court, has also been interpreted to permit the award of post-judgment interest against the state of Missouri. Steppelman, supra at 345.

a federal court. Thus, whatever may be the resolution of the issue posed by Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987), it simply does not arise in the present case and should not be addressed herein by the Court.

II.

THE DECISION BELOW IS CLEARLY CORRECT

The Eighth Circuit correctly rejected the view of the First Circuit in Rogers v. Okin, supra, that this Court's decision in Library of Congress v. Shaw, 478 U.S. 310 (1986) somehow barred the use of current rates to compensate attorneys under 42 U.S.C. § 1988 when fees are awarded against a state agency. As we will explain below, the First Circuit's decision is based on a fundamental misreading of Shaw and the Eleventh Amendment and is not likely to be followed by any other court. Moreover,

the limited nature of the Shaw rule, as explicated by this Court in the recent decision of Loeffler v. Frank, 486 U.S.__, 100 L.Ed.2d 549 (1988), and the unlikelihood that the issue will arise in other cases, make the issue presented unimportant. Respondents therefore urge that the Court should deny certiorari and decline to review the issue unless and until a widespread conflict among the courts of appeals becomes evident.

As explained in Loeffler, the Shaw rule derives from an ancient doctrine applicable only to federal agencies; that is, the federal government's sovereign immunity prohibits an award of interest against it unless Congress so provides either by a specific statute dealing with interest or by a general waiver of sovereign immunity with regard to a particular agency of the government. This

doctrine has been codified in 28 U.S.C. § 2516 and, therefore, is binding on the courts.

The Eleventh Amendment, the basis of the First Circuit's decision in Rogers, on the other hand, is not a general statement of sovereign immunity. Rather, as the Eighth Circuit correctly held in the present case, it is a limitation on the power of the federal courts to hear certain types of actions against states unless Congress provides otherwise or the state itself acquiesces in the jurisdiction of the federal courts expressly or by implication. Once, however, relief is properly awardable against a state, there are no general limitations on such relief that stem from any residual sovereign immunity that the state may claim.

Thus, as again the Eighth Circuit

properly held, the governing decision here is Hutto v. Finney, 437 U.S. 678 (1978), which held that fees could be awarded against a state pursuant to § 1988 despite the Eleventh Amendment. Hutto held that § 1988 was enacted pursuant to Congress' power to enact legislation to enforce the Fourteenth Amendment; therefore, that power overrode the Eleventh Amendment's limitation on the power of the federal courts.

Hutto held, in the alternative, that a reasonable attorney's fee in a suit against the state for prospective relief was itself prospective relief not barred by the Eleventh Amendment. Id. at 695. This latter ground was completely overlooked by the First Circuit in Rogers.

Once the court below had the power to assess fees against the defendant state at all, it had power to assess a fee that was

fully compensatory. As Loeffler makes clear,[5] an adjustment for delay in payment is part of a fully compensatory fee, but was not awardable against a federal government agency solely because of the sovereign immunity of the federal government itself.

Reading Rogers one is left with the firm impression that the parties viewed the Eleventh Amendment issue as an afterthought in an appellate battle that concentrated on issues raised by Hensley v. Eckerhart, 461 U.S. 424 (1983). Respondents submit there is reason to doubt whether the First Circuit's consideration of the Eleventh Amendment issue in Rogers was guided by the thorough briefing warranted by its

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[5]See 100 L.Ed.2d at 558, n. 5. See also, Pennsylvania v. Delaware Valley Citizens Council, 483 U.S. ___, 97 L.Ed.2d 585, 592, 604-05 (1987).

complexity. First, the issue was neither raised in nor considered by the district court, since this Court's decision in Shaw was issued after the district court's fee award. 821 F.2d at 28. Second, the First Circuit itself expressly noted that the Eleventh Amendment issue "was allowed only five pages in [the Commonwealth's] 98-page main brief." 821 F.2d at 28. Respondents submit that the issue raised by petitioners was correctly resolved by the Eighth Circuit in the instant case by routine application of Eleventh Amendment case law, and that therefore certiorari should be denied until more than two courts of appeal have considered the question, since it is likely the seeming conflict may be resolved as a result of future cases in the courts of appeals. See Stern, Gressman & Shapiro, Supreme Court Practice 198, 200 (6th Ed.).

THE AMOUNT OF FEES APPROPRIATE IN THIS CASE WAS A MATTER WITHIN THE SOUND DISCRETION OF THE DISTRICT COURT.

Despite the efforts of the petitioners, the remaining issues presented by the petition for a writ of certiorari are simply not appropriate for review by this Court. As demonstrated by the decisions below and by the Statement of the Case above, there were no novel issues of law presented by the fee applications here. The problem faced by the district court was the correct application of the law as established by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) to a particular set of facts unique to this case. Indeed, the fees hearing was postponed until the Eighth Circuit's en banc decision on the merits had been reached, in order that the district court's Hensley determinations would be guided by the appeals court's

would be guided by the appeals court's decision. The parties were able to make as complete a factual record as they desired, argued their positions as to the proper application of Hensley, were provided a hearing by the district court, and submitted detailed proposed findings. The district court, after these exhaustive submissions, reviewed the record and made its findings of fact based not only on the fee applications and the evidence adduced in relation thereto, but on its own intimate knowledge of the litigation as a whole. Its resolutions of the myriad factual questions thus presented, which were upheld in their entirety by the court of appeals, simply do not merit the exercise of this Court's discretionary review.

In affirming the district court's application of Hensley, a resolution that

adopted the 15 to 20 percent lodestar reduction proposed by plaintiffs, the Eighth Circuit was cognizant that it was this same district court that had ruled against plaintiffs on their inter-district claims against the suburban districts and the federal defendants and thereby necessitated the application of Hensley in the first place. Without question, the district court had intimate familiarity with the plaintiffs' successful and unsuccessful claims, the interrelatedness of the claims, and the results obtained.[6]

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[6]Petitioners also cite Vaughns v. Board of Education of Prince Georges County, 598 F.Supp. 1262 (D. Md. 1984), aff'd, 770 F.2d 1244 (4th Cir. 1985), for the proposition that expenses incurred on unsuccessful claims must be excluded per Hensley. Petitioners, however, do not claim that Vaughns represents a conflict among the circuits, as they indeed cannot, for the question of a percentage reduction of plaintiffs' expenses based on Hensley was not appealed to the Fourth Circuit. Furthermore, although the district court in Vaughns did apply the percentage reduction used on the fees claim to

Of course, this Court does not grant certiorari to review evidence and discuss specific facts. United States v. Johnson, 268 U.S. 220, 227 (1925). Although, as petitioner notes, the Eighth Circuit did comment that it "might not have arrived at the same result as the district court" had it fixed the initial percentage reduction, 838 F.2d at 264, it concluded the district court's Hensley findings were not clearly erroneous. Findings of fact made by the district court and concurred in by the court of appeals are subject to the "two court" rule, Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949),[7] the application of which is made

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plaintiffs' expenses claim, the district court implied it retained discretion to conclude otherwise, stating only that "on a rough justice basis" the same percentage "is appropriate." Id. at 1290.

[7]"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake

all the more compelling in the instant case because each of the judges on the panel that decided the fees appeal participated in the en banc decision on the merits and, most importantly, the judge who wrote the en banc decision also wrote the panel decision on fees.

In Hensley this Court expressed the strong view that fee applications should not give rise to extended independent litigation (461 U.S. at 437); a number of courts of appeals, including the Eighth Circuit, have repeatedly admonished that parties should not routinely seek review of the manner in which a district court has exercised its sound discretion in awarding fees, in the absence of compelling indications that that

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to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." 336 U.S. at 275.

discretion has been abused. E.g., Moore v. City of Des Moines, 766 F.2d 343, 345-46 (8th Cir. 1985), cert. denied, 474 U.S. 1060 (1986). Nevertheless, petitioner has continued to pursue just such an appeal; to grant certiorari on the issues thus presented, would encourage other litigants, plaintiffs and defendants alike, to appeal fee decisions they are dissatisfied with and discourage the prompt compromise and reasonable resolution of fee claims.[8]

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[8]Petitioners noted that this Court has granted review in Blanchard v. Bergeron, 831 F.2d 563 (5th Cir. 1987), review granted, No. 87-1485, 56 U.S.L.W. 3873 (June 28, 1988), and assert that Blanchard raises a "similar issue" to petitioners' contention that § 1988 does not permit the award of fees for paralegals and law clerks at market rates. Respondents would observe that the question of paralegal hourly rates, although raised, was not addressed by the Fifth Circuit in Blanchard. That court only held that a contingency fee agreement between plaintiff and his counsel would operate as a cap on the fee which could be recovered from the defendant. Because the fee cap imposed by the contingency agreement was apparently substantially below the lodestar, the Fifth Circuit declined any discussion of paralegal and law clerk hourly rates, stating only that such hours "would also naturally be included within the contingency fee." Id. at 564. Even if this Court reverses the Fifth Circuit's holding on the fee cap issue, it would seem unlikely that it would decide the paralegal rates issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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